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CHARLES ELMORE CR[illegible]
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IN THE SUPREME COURT OF THE UNITED STATES

HARRY C. DAVIS, C. J. ROOT and ROY HOLLIS,
Petitioners,

vs.

CITY OF HOMESTEAD, FLORIDA, and
THE UNITED STATES OF AMERICA (Intervenor),
Respondents.

PETITION FOR WRIT OF CERTIORARI, AND SUPPORTING BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

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Petitioners,

vs.

CITY OF HOMESTEAD, FLORIDA, and
THE UNITED STATES OF AMERICA (Intervenor),
Respondents.

PETITION FOR WRIT OF CERTIORARI

TO: THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Your Petitioners respectfully show:

Statement of the Case

On May 3, 1939, a year and a half after consummating a planned 75% refunding which was contingent up to that point but became final and effective when that percentage was attained, the City of Homestead filed a petition in the Southern District of Florida under Sections 81-84, Chapter IX, of the National Bankruptcy Act of August 16, 1937, as amended by the Act of June 22, 1938, for the purpose of forcing the same refunding terms upon a minority which had refused to settle on those terms, through the renewed consents or votes of the 75% group of creditors who had so settled previously by separate executed unconditional contracts.

The prior Refunding Contract (R. 20-32) was made a part of the City's petition (R. 1-19), and the 75% provision of the contract (R. 31) was frankly alleged (R. 2-3).

The Refunding Contract was presented to the creditors or October 18, 1937. It proposed, as to creditors who should contract thereunder, that serial bonds be replaced by new bonds to be dated October 1, 1937, at reduced interest, and to mature in thirty years (R. 22); that coupons past due on that date be surrendered for non-negotiable, non-interest bearing, non-maturing certificates payable 25¢ on the dollar (R. 26); that a separate tax be levied to pay interest on new bonds (R. 23), and that excess revenues should be used to purchase and retire new bonds and also old bonds which should continue unrefunded and outstanding (R. 23-24); that a special tax be earmarked as a sinking fund for new bonds (R. 24); and that old bonds and coupons surrendered on exchange by the parties to the Refunding Contract should be destroyed (R. 25).

The 75% goal was reached (R. 2), and thereupon the city performed (R. 3-5). The resolutions carrying the contract into effect were dated November 8, 1937 (R. 32-47), and November 19, 1937 (R. 47-61). The former resolution recited that it was made pursuant to the contract (R. 34), and expressed the "belief" that the non-contracting minority later would refund on the same basis (R. 34); it recited that the refunding was under the Florida General Refunding Act of 1931, which permits a city to refund "any and all bonds, coupons or interest on any such bonds" (R. 34).

Those resolutions directed prompt issuance and exchange of new securities, and cancellation of the old securities (R. 45-46 and 58-59); and each recited that it should become effective immediately because of the necessity for restoring the City's credit (R. 46-47 and 60). The petition showed consummation as to the contracting majority (R. 4-8). The old bonds and coupons surrendered on exchange had been cancelled (R. 5).

On May 1, 1939, the City purported to adopt the terms of that 1937 Refunding Contract as a plan of composition (R. 71-73).

All of the consents supplied and relied upon by the City's Bankruptcy petition were those of holders of the new securities (R. 10-13) who had already settled irrevocably (R. 5-8).

The original contracts on which the majority refunding was consummated in 1937 covered $766,500 of bonds (R. 2), amounting to 78.2% of the total then outstanding. A provision required the City to permit others to refund later, on the same basis, if they should choose to do so (R. 29-30); but the finality of the 75% refunding, as to those who contracted therefor and participated therein, was not contingent upon whether or not any or all of the unrefunded minority should so refund. (See contract at R. 20 and 31, bond resolution Sec. 8 at R. 45 and interest resolution Sec. 14 at R. 59).

Between the time of the 1937 settlement by 78.2% and the time of the suit in 1939, holders of an additional $59,000 of bonds settled with the City on the same basis, raising the percentage of prior settlements to 84%.

These Petitioners, holding substantial amounts of unrefunded securities (R. 61-63), moved the District Court to dismiss the proceeding, contending (R. 86-89, 95-96) that the matter presented was beyond the scope of the Bankruptcy Composition Act invoked, which, if construed to apply to the facts at hand, violated the Fifth and Tenth Amendments to the Constitution; and jurisdiction was attacked for want of required consents of creditors holding securities affected by the plan, as defined in the Act.

The United States intervened (R. 115, 116). After a hearing on notice the District Court denied the legal objections and motions to dismiss (R. 117-118). These petitioners appealed (11 U. S. C. A. § 47 (a)), and jointly submitted their objections to the Circuit Court of Appeals for the Fifth Circuit (R. 123-124), which affirmed (R. 130-132). Rehearing (R. 133-151) was denied on July 8, 1940 (R. 152).

Reasons Relied on for the Allowance of the Writ

1. Conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Luehrmann v. Drainage Dist. No. 7 of Poinsett County, Ark.*, 8 Cir., 104 F. (2d) 696, 700, 701, decided June 13, 1939, on the matter of the right to vote in a composition under this Act, of a creditor who has already settled, being determined by whether or not the creditor has retained his original status, by conditioning his action upon ultimate 100% refunding.

2. The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions.

The question here referred to is whether or not an executed partial refunding is legally final and irrevocable as to those so participating.

Reasons as to the importance of the question, and the Florida decisions affected are shown in Point II of the Argument in the supporting brief.

3. The Circuit Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court:

(a) By holding that the Municipal Bankruptcy Composition Act of August 16, 1937, as supplemented by the addition of sub-section (j) to § 83, by the Act of June 22, 1938, was intended to extend to the situation presented.

(b) By holding that application of the Act to proceedings beyond the established scope of bankruptcy compositions does not transgress the limits of the existing legislation under the Bankruptcy power.

(c) Importance of the questions results not alone from their nature, but because they relate to a law of general application throughout the country; also, the situation presented is typical of many. In Florida alone numerous cities, coun-

ties and other taxing units have refunded irrevocably as to a majority, but not as to all creditors. A number of other such cases are now pending. A recent amendment to the Act (H. R. 9139, approved June 28, 1940), making it applicable to counties, will tend to multiply the instances in which this situation will be presented in the lower courts.

4. The Circuit Court of Appeals has decided a federal question in a way probably in conflict of the decision of this Court in *United States v. Bekins*, 304 U. S. 27, by holding that the Act is not restricted to compositions in bankruptcy.

WHEREFORE your Petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket "No. 9393, Harry C. Davis, et al., Appellants, v. City of Homestead, Florida, et al., Appellees," and that the said decree of the Circuit Court of Appeals may be reversed by this Honorable Court, and that Petitioners may have such other and further relief as to this Court may seem proper.

Dated August 10, 1940.

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Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Reference to Opinion of the Court Below

The opinion of the Circuit Court of Appeals is reported under the style of Davis, et al., v. City of Homestead, Florida, et al., 112 F. (2d) 438 (advance opinions of July 22, 1940).

The case was argued in the Circuit Court of Appeals along with a somewhat similar case, No. 9369, styled as American Nat. Bank v. City of Sanford, Fla., et al., the opinion in which is reported in 112 F. (2d) 435.

The Homestead opinion adopts and applies the Sanford case opinion. Both should be considered as being opinions delivered by the Court below in this case.

II.

Statement of Grounds of Jurisdiction

The Federal Statute, the construction and validity of which is involved, is Sections 81-84, of Chapter IX of the Bankruptcy Act of August 16, 1937, 50 Stat. 654, as supplemented by the Act of June 22, 1938, 52 Stat. 940 (11 U. S. C. A. § 401-404). The appeal below was taken by these Petitioners under 11 U. S. C. A. § 47 (a). The decision is reviewable by this Court under 11 U. S. C. A. § 47 (c). A Writ of Certiorari is applied for, as provided for by Section 240 of the Judicial Code as amended (28 U. S. C. A. § 347). The opinion of the Circuit Court of Appeals was filed June 5, 1940, and petition for rehearing was denied July 8, 1940.

III.

Statement of the Case

The "Statement of the Case" set out at pages 1 to 3 of the foregoing Petition for Certiorari is believed to be adequate for the purposes of this brief, and therefore is not repeated.

IV.

Specification of Errors Intended to be Urged

Errors of the Circuit Court of Appeals intended to be urged, which are made to appear from its opinion in this case, and from its opinion in the companion City of Sanford case, are:

1. Sanctioning consents or votes amounting to majority control, offered by creditors who had irrevocably scaled their debts to the terms involved, through the fiction of treating such creditors as though they had retained their original status; in conflict with the decision of the Eighth Circuit in that matter, in *Luehrmann v. Drainage Dist. No. 7.*

2. Holding that the prior executed partial (75%) refunding was not complete and that the changed debt status of the City, which resulted therefrom, could be ignored; in conflict with the applicable decisions of the Florida Supreme Court in the cases of *State ex rel. Garland v. City of West Palm Beach*, decided January 5, 1940, and *State v. City of West Palm Beach*, decided February 16, 1940.

3. Construing this Act of Congress to be applicable to a proceeding which is beyond the scope of compositions in bankruptcy.

4. Failing to test the application of the Act, beyond its composition scope, against Appellants' claims that the Fifth and Tenth Amendments were violated by going outside the limits of the Act; the Court having dealt with the question on the irrelevant theory of "vested rights."

ARGUMENT

Point I.

The Decision of the Circuit Court of Appeals Approving Majority Consents of Creditors Having Irrevocably Scaled their Debts Conflicts with the Decision of the Eighth Circuit in this Matter, in Luehrmann v. Drainage Dist. No. 7.

In the Luehrmann case, decided June 13, 1939 *(Luehrmann v. Drainage Dist. No. 7 of Poinsett County, Ark.*, 8 Cir., 104 F. (2d) 696, at 700-701), the Circuit Court of Appeals for the 8th Circuit considered an objection that the controlling consents were by those who had already scaled their debts to the terms involved. The refunding was one in which the creditors were to surrender their securities for money to be paid through funds advanced by the RFC. The plan was largely executed.

It was found and held that the participation of the majority had not resulted in a final scaling of the debts involved, because the steps taken were tentative, and conditioned upon ultimate 100% completion. The original rights had been preserved for possible resumption, if the plan should fail of complete consummation. The agreements were found to have been expressly so conditioned. The securities which had been surrendered were not cancelled—a point emphasized in this connection in this and the other drainage and irrigation district cases cited. The old securities were in the hands of a trustee, for the purpose mentioned.

Thus that Court said, "For this reason we think the classes of bondholders and judgment creditors so far retained their original status as entitled them to be counted as acceptors of this composition plan."

The question of the effect of partial execution had arisen in a number of such cases in District Courts in each of which the matter was resolved, as in the decision of the 8th Circuit, on the basis that the undertaking was expressly contingent upon total extension. *In re Drainage Dist. No. 7 of Poinsett*

County, Ark., 25 F. Supp. 372; *In re Merced Irr. Dist.*, 25 F. Supp. 981; *In re Lindsay-Strathmore Irr. Dist.*, 25 F. Supp. 988; and *In re Corcoran Irr. Dist.*, 27 F. Supp. 322.

The Corcoran case distinguished that situation from a non-contingent executed partial refunding, such as the bond-by-bond refunding in the Sanford case, and the 75% refunding in this Homestead case, and said, "We are not dealing here with a completed plan of reorganization. In re City of West Palm Beach, 5 Cir., 1938, 96 F. (2d) 85." The West Palm Beach case had revealed a bond-by-bond refunding contract substantially completed, but not contingent upon total completion. The Fifth Circuit had recognized it as such in 1938.

It is to be noted that the Luehrmann case and others cited, including the Corcoran case, were decided after the 1938 Amendment to the Act relating to the effect of partial execution of plans of composition.

The holding of the Fifth Circuit in the present case, approving majority consents of those who had scaled their debts and who had failed to preserve their original status, results and necessarily will result in conflicts on this point in the different Circuits.

In our case the Court appeared to recognize the necessity for preserving the original status, but evaded the feature by assuming that those who had settled might as well be considered as having revoked their settlement contracts. That assumption was unwarranted, because (a) such was not the fact; (b) the contract itself had required the old bonds to be cancelled when exchanged, and such had been done, extinguishing the old debt; and (c) restoration of the status *quo ante* was not legally possible, since the Florida Refunding Act would prevent withdrawal of the present refunding securities and their replacement now with securities in the original larger amounts.[1]

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(1) Chapter 15772, Laws of Florida, Acts of 1931, Section 14: "* * * The Principal and accrued interest of the refunding bonds shall not exceed the amount of the obligations refunded."

Point II.

The View of the Circuit Court of Appeals that the Executed Majority Refunding was not Complete so as to Accomplish a Changed Debt Status to that Extent, Conflicts with Decisions of the Florida Supreme Court.

The Florida Supreme Court has passed on the question in two cases, in which it considered the result and effect of a partial (majority) refunding by the City of West Palm Beach. The refunding plan proposed by that City in 1936 became executed as to holders of 93% of the bonds. Those who refunded had not preserved their original debt status. Their action was final and not contingent upon ultimate extension of the terms to all creditors of the classes affected. It appeared as a bond-by-bond refunding similar to the procedure employed by the City of Sanford. The only difference between it and the City of Homestead refunding was that the latter was contingent until 75% had contracted, but became final as to those creditors at that point and was then on the same bond-by-bond basis.

In *State ex rel. Garland v. City of West Palm Beach*, 193 So. 297, the Florida Court held that the proceeds of taxes levied under the Florida General Refunding Act of 1931, for servicing the new bonds which had been issued and exchanged in the partial refunding, were from a separate tax source, and beyond the reach of holders of defaulted unrefunded bonds. That holding was made in spite of the law of that State that a bondholder could impound and cause to be applied in payment of a defaulted security, any proceeds of taxes levied for payment of the original bond debt (Florida recognizes the "first come, first served" doctrine).

Thus, the partial refunding in the Homestead case has put that City in a position of levying taxes for interest and sinking fund for the new bonds exclusively, earmarked, and beyond the reach of holders of unrefunded bonds—a situation which could not prevail if the new debt created by delivery of refunding bonds was not final and unconditional.

Also, in *State v. City of West Palm Beach*, 193 So. 839, decided in February of 1940, the Florida Court validated bonds of that City issued for the purpose of refunding only the minority group which had refused its earlier majority refunding accomplished in 1936. That second partial refunding, applying only to the minority, was on more liberal terms.

Those who had participated in the majority refunding opposed validation, contending that all had to be treated on the same terms on which they had settled. The Florida Court held otherwise.

In so holding, the Florida Supreme Court upheld the action by which the City had abandoned its effort to force the original terms on the minority (after the 1938 Amendment of the Bankruptcy Act) "apparently conceiving difficulties that might be encountered in seeking relief in the bankruptcy court."

In the present case, the Circuit Court of Appeals proceeds on the theory that the executed majority refunding can be ignored, and that the prior total indebtedness should be considered as still existing in its original amount and status.

Point III.

The Circuit Court of Appeals Construed the Bankruptcy Act to be Applicable to a Proceeding which is Beyond the Scope of Bankruptcy Compositions.

The Circuit Court of Appeals of the Fifth Circuit had previously committed itself to the view that a composition in bankruptcy required that a controlling majority must have an identity of interest which does not exist in them after prior independent settlement. *In re The City of West Palm Beach, Fla.*, 5 Cir., 96 F. (2d) 85, *Texas Hotel Securities Co. v. Waco Development Co.*, 5 Cir., 87 F. (2d) 395, and *Continental Ins. Co. v. Louisiana Oil Ref. Corp.*, 5 Cir., 89 F. (2d) 333.

That Court had recognized that a majority who had refunded in the West Palm Beach matter could not be classed as acceptors in a purported bankruptcy composition designed to force the refunding terms upon the minority.

The decision in the West Palm Beach case occurred after the 1937 Municipal Bankruptcy Act was in effect, but before the addition of sub-section (j) by the Act of June 22, 1938, to Section 83 of the 1937 Act. (U. S. C. A., Title 11, § 403).

When this Homestead case came before the Court, the situation presented was the same in all material respects. The question, then, was whether the Act, with the benefit of the 1938 addition, authorized a creditor majority to exercise control in a manner beyond the scope of compositions in bankruptcy, and in violation of basic principles of compositions.

We feel that this is not the place for a detailed discussion of the features of the Act as amended, which compel the construction that the Act relates only to compositions in bankruptcy, and that the additional provision for voting by those who have participated in partial execution, refers to participation under a composition agreement, contingent upon its final extension to all, and is not intended to authorize those who have irrevocably scaled their debts to ignore their changed status.

We content ourselves at this time with saying that the definition in Section 82 of the Act (11 U. S. C. A. § 402), to the effect that "securities affected by the plan" are those as to which the holders' rights are to be materially changed or modified by the extension of the plan to all, remains controlling; and that the other material provisions of the Act, including the language of the amendment itself, show that great care was taken to confine the Act to bankruptcy compositions.

By sanctioning the consents of the refunded majority, the Circuit Court of Appeals has done one of two things: (a) it has construed the amendment to destroy the composition character and limit of the Act, or (b) it has approved

an application of a composition statute to a situation of a character previously recognized by that Court as not constituting a composition. From the Court's opinion, it is not clear which was the basis of its decision, although in the Homestead opinion the Court intimated that because the refunding was begun at a time when a valid composition Act was in existence, the refunding might be presumed to have had the characted of a composition—an inference refuted by the nature of the refunding contract itself and the action taken under it.

Point IV.

In Upholding an Application of the Act Beyond its Composition Scope, the Decision of the Circuit Court of Appeals Ignores Constitutional Barriers.

In its consideration of the 1937 Act, in the case of *United States v. Bekins*, 304 U. S. 27, this Honorable Court pointed out that the Act invoked the bankruptcy power in relation to a matter normally within its province, and was restricted to bankruptcy compositions. As such, the Act was approved, as not conflicting with the Fifth Amendment. State consent avoids conflict with the Tenth Amendment, but that consent is no broader than the Act.

If the Amendment of 1938, relating to the effect of partial execution of composition agreements, has lifted the Act into a field of bankruptcy not normally within its province, or otherwise beyond the scope of bankruptcy compositions, then its validity, in the case presented, should have been tested against the Fifth and Tenth Amendments. That test should be on the basis of whether it results in depriving the minority of rights and property without due process of law, and on whether the State's consent is adequate under the enlarged scope.

If the Act as amended remains restricted to composition agreements, the present application beyond its scope gives it an operation outside of the restrictions on its use which

this Court pointed out in the Bekins case. Approval of such practice by the Circuit Court of Appeals is a misinterpretation of this Court's opinion in the Bekins case, and represents a failure of the Circuit Court of Appeals to follow and apply the ruling of this Court.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM 1940

No. 324

HARRY C. DAVIS, C. J. ROOT and ROY HOLLIS,
PETITIONERS

versus

CITY OF HOMESTEAD, FLORIDA, and THE UNITED STATES OF AMERICA (Intervenor),
RESPONDENTS.

BRIEF OF RESPONDENT
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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1940

No. _____

HARRY C. DAVIS, C. J. ROOT and ROY HOLLIS,
PETITIONERS

versus

CITY OF HOMESTEAD, FLORIDA, and THE UNITED STATES OF AMERICA (Intervenor),
RESPONDENTS.

Brief on Behalf of Respondent, City of Homestead, Florida, on Petition for Writ of Certiorari of Harry C. Davis, C. J. Root and Roy Hollis to the United States Court of Appeals, Fifth Circuit.

STATEMENT OF THE CASE

On May 3, 1939 the City of Homestead, Florida, filed a Petition in the District Court for a composition of its bonded indebtedness based on the terms set forth in a Refunding Contract and Agreement

dated October 18, 1937. The petition filed by the City of Homestead in the District Court recited and set forth the Refunding Agreement for the purpose of showing the terms upon which the proposed composition was based and the purpose and intent of the City to refund its entire bonded indebtedness upon the terms therein suggested. (R. 20-32) (See also, Resolution No. 400 (R. 32-47)).

The agreement and resolution provided that the City would refund the bonds of all creditors, whether the owners of the bonds were parties to the agreement or not (R. 30).

The agreement further provided that when "not less than seventy-five per cent of the principal amount of the outstanding bonds of the City of Homestead" had agreed, "then the said City of Homestead, Florida, will proceed to do all things hereinbefore provided, and this agreement then becomes operative and effective between the respective parties hereto."

In this statement of the case we set forth the above data and facts to show that the City of Homestead, Respondent herein, did not contemplate merely a 75% refunding of its obligations, as stated by Petitioners here, and only with the signers of the agreement, but a refunding of 100% of its entire debt.

It serves no useful purpose in this statement of the facts of the case to state the provisions of the refunding or adjustments relative to the levies or other means therein provided for the payment of the bonds or certificates, except to say, they are to

be paid by general ad valorem levies. In accordance with the terms and provisions of the refunding agreement and resolutions, refunding bonds and coupon certificates to the total amount of 100% of the debts of the City were validated and placed with a fiscal agent for exchange. As stated by Counsel for the Petitioners herein in his statement of the case—at the time of the filing of the petition in the District Court, 84% of the total outstanding debts had been refunded and the holders of more than 51% of the obligations of the City "affected by the Plan" had consented (R. 16-18).

The District Court approved the filing of the Petition and ordered a hearing in the usual manner. The Petitioner here, Roy Hollis, filed an answer and objections to the Plan of Composition (R. 80-85), and Harry C. Davis and C. J. Root moved the Court to dismiss the petition (R. 86-89, 102-105). The answer and motions to dismiss alleged, among other things, that Section 83 (j), if construed to authorize the inclusion of consents of owners of refunded bonds and certificates in the 51% consenting creditors required by the Municipal Bankruptcy Act for the filing of the petition, and 66 2/3% necessary for the confirmation of the plan, would violate the Fifth and Tenth Amendments to the Constitution of the United States of America (R. 87-96, 103-104, 111-112).

The United States intervened and suggested that the objections raised by the Petitioners be overruled, and the District Court denied the motions to dismiss and the answer insofar as the same relates to the legal questions raised in the motions to dismiss.

An appeal was taken to the Circuit Court of Appeals for the Fifth Circuit from the order denying the motions to dismiss and the "legal questions of similar import in the answers" (R. 117).

The Circuit Court of Appeals for the Fifth Circuit affirmed the ruling of the lower court. (Harry C. Davis, et al., v. City of Homestead, Florida, et al., 112 F. (2d) 438) Advance Opinions, July 22, 1940. (R. 130-132). Rehearing denied by the Circuit Court of Appeals for the Fifth Circuit, without opinion, July 8, 1940 (R. 152).

In the Petition for Writ of Certiorari, counsel emphasizes the provisions of the Refunding Contract and Agreement, claiming that the same became final when 75% of the holders of the outstanding bonds of the City had signed the agreement and that this was the consummation of the original Plan for refunding. The Refunding Contract and the Petition filed in the District Court clearly show that this was not the finality of the refunding plan, but the beginning, and that it was the purpose and intent of not only the City, but of those who signed and those who accepted refunding bonds that it should be a 100% refunding. The holders of the unrefunded securities (Petitioners for Writ of Certiorari), insist that Section 83 (j), Chapter IX of the Bankruptcy Act, August 16, 1937, as amended by the Act of June 22, 1938 (11 U. S. C. A. 403 (j)), does not afford the City of Homestead the relief sought in the District Court.

We look to the original Act before amendment for the authority for the procedure, and to the

amendment, sub-section (j), for an extension of the relief afforded by the original Act to public debtors having theretofore voluntarily attempted to adjust their obligations.

We quote the amendment, with our emphasis noted:

> "(j) **The partial completion** or execution of any plan of composition as **outlined in any petion** filed under the terms of this act by the **exchange of new evidences** of indebtedness under the plan for evidences of indebtedness covered by the plan, whether such partial completion or execution of such plan of composition **occurred before or after the filing** of said petition, shall not be construed as **limiting** or **prohibiting the effect of this act,** and the written consent of the **holders of any securities** outstanding as the result of any such partial completition or execution of any plan of composition **shall be included as** consenting creditors to such plan of composition in determining the percentage of **securities affected by such plan of composition."**

This is a companion case to the case of American National Bank of Nashville, Tennessee, versus City of Sanford, Florida, et al., 112 F. (2d) 435, also before the Court on a Petition for Writ of Certiorari.

ARGUMENT

The sole question involved is the construction of Section 83 (j) of the Bankruptcy Act as amended (11 U. S. C. A. 403 (j)), and its constitutionality under the Fifth and Tenth Amendments to the Constitution of the United States.

Section 83 (j), construed to require the inclusion of the holders of the new refunding bonds or certificates among the creditors owning 51% of the bonded indebtedness consenting to the filing of a plan of composition, is constitutional.

Section 83 (j), construed to require the inclusion of the holders of the new refunding bonds or certificates among the creditors owning 66 2/3% of the bonded indebtedness consenting to the confirmation of the plan of composition, is constitutional.

Counsel for the Petitioners has seen fit to divide his argument into four points, and the same order will be observed for convenience in this brief.

POINT I

The Decision of the Circuit Court of Appeals Approving Majority Consents of Creditors Having Irrevocably Scaled their Debts Conflicts with the Decision of the Eighth Circuit in this Matter, in Luehrmann v. Drainage Dist. No. 7.

There is no conflict, express or implied, between the decision of the Circuit Court of Appeals of the Fifth Circuit in this case and the decision of the Circuit Court of Appeals of the Eighth Circuit in the

case of Luehrmann v. Drainage Dist. No. 7 of Poinsett County, Ark., 104 F. (2d) 696.

The objection raised by the non-assenting bondholders in the Luehrmann case is as follows:

> "2. The bondholders who have already scaled their debts before this petition was filed cannot be counted as preliminary acceptors of the plan, nor as part of the two-thirds ultimately necessary to the confirmation of the plan." (p 699).

In considering and in overruling this objection and thereby not showing any conflict with either the City of Sanford or the City of Homestead cases, the Court said:

> "(7) The next and final specification of objection in the Luehrmann appeal is that the plan to pay all bondholders 25.879 cents on the dollar 'discriminates unfairly against non-assenting bondholders because it would compel these appellants, as holders of liens, to relinquish these liens to the petitioners without just compensation'. This involves a consideration of the nature and effect of composition proceedings under the provisions of the Bankruptcy Act. In support of this contention appellant relies strongly upon the holding of the Supreme Court in the Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 55 S. Ct. 854, 79 L. Ed. 1593, 97 A. L. R. 1106, that the bankruptcy power is subject to the Fifth Amendment, U. S. C. A. Const., and that private property shall not be taken even for a wholly public use without just compensation. But in this

opinion (295 U. S. loc. cit. 585, 586, 55 S. Ct. loc. cit. 861, 79 L. Ed. 1593, 97 A. L. R. 1106) some very pertinent and distinguishing language concerning compositions is used: 'So far as concerns dissenting creditors, the composition is a method of adjusting among creditors rights in property in which all are interested. In ordering the adjustment, the bankruptcy court exercises a power similar to that long exercised by courts of law. (Citing cases). It is the same power which a court of equity exercises when it compels dissenting creditors, in effect, to submit to a plan of reorganization approved by it as beneficial and assented to by the requisite majority of the creditors. (Citing cases). In no case of composition is a secured claim affected except when the holder is a member of a class; and then only when the composition is desired by the requisite majority and is approved by the court. Never, so far as appears, has any composition affected a secured claim held by a single creditor. Compositions are comparable to the voluntary adjustment with the mortgagee provided for in paragraph 3 of the Frazier-Lemke amendment (11 U. S. C. A. Sec. 203(s) (3)). They are not analogous to the so-called adjustment compelled by paragraph 7, (11 U. S. C. A. Sec. 203(s) (7)).'

"This view of compositions is foreshadowed by the opinion of the same court in Continental Illinois Nat. Bank v. Chicago, Rock Island & P. Railway Company, 294 U. S. 648, 673, 674, 55 S. Ct. 595, 605, 79 L. Ed. 1110, construing and upholding Section 77 of the Bankruptcy Act, added by

> the Act of March 3, 1933, 11 U. S. C. A. Sec 205: 'The confirmation and legalization of "a scheme of arrangement" under such circumstances is no more than is done in bankruptcy when a "composition" agreement with the bankrupt debtor, if assented to by the required majority of creditors, is made binding on the non-assenting minority. In no just sense do such governmental regulations deprive a person of his property without due process of law. * * * Every member of a political community must necessarily part with some of the rights which, as an individual, not affected by his relation to others, he might have retained."

Further, there is no conflict in any decision that we have been able to find rendered since the adoption of the Municipal Bankruptcy Act in any Circuit which in any manner conflicts with the decisions in the Homestead and Sanford cases. To the contrary, they support and complement these cases.

United States v. Bekins, et al.,
304 U. S. 27, 58 S. Ct. 811.

In re Corcoran Irr. Dist.,
27 F. Supp. 322 (D. C. Cal.)

In re City of Ft. Lauderdale,
(D. C. Fla.) 23 F. Supp. 229.

In re Drainage Dist. No. 7 of Poinsett
County, Ark., 25 F. Supp. 372 (D. C. Ark.)

In re Merced Irr. Dist.,
25 F. Supp. 981 (D. C. Cal.)

Vallette, et al., v. City of Vero Beach, Fla., 104 F. (2d) 59. (Certiorari denied Oct. 9, 1939), 60 S. Ct. 110.

In re B. & O. R. R. Co., 29 F. Supp. 608 (D. C. Md.)

Campbell v. Alleghany Corp., 75 F. (2d) 947.

In re Wichita Falls & Southern Ry. Co., 30 F. Supp. 750 (D. C. Tex.)

Great reliance is placed by Petitioners for the writ upon the provisions in the Homestead Refunding Agreement that the securities surrendered were to be cancelled and, therefore, the refunding bonds were new obligations of a separate class apart and from the bonds not refunded. However, the Supreme Court of the State of Florida, relative to refunding obligations, has said:

> "Thus refunding bonds are not only obligations in themselves for what they purport to be on their face and under the statutes pursuant to which they are issued, but are authorized extensions and continuations of the obligations represented by the bonds that are refunded by them, which original obligations are not extinguished by, but are merged into, the refunding bonds with like force and effect as if the original bonds had remained unrefunded by the issuance of such refunding bonds." State ex rel Pinellas County v. Sholtz, 155 So. 736, Bay County et al v. State, 157 So. 1.

It therefore appears that not only from the detailed provisions of the Refunding Agreement, but also from the fact that the original obligation was still preserved even though refunding bonds were issued, owners of refunding bonds can be considered as among those authorized to give consents first, to the filing of the Petition, and secondly, to the confirmation of the Plan. And not overlooking the provisions of the Act (Sec. 402) that, "security affected by the plan" means a security as to which the rights of the holder are proposed to be adjusted or modified materially by the **consummation of a composition agreement** and that those "payable without preference out of funds derived from the **same source or sources shall be of one class.**" (Sec. 403 (b)) (Emphasis ours).

POINT II

The View of the Circuit Court of Appeals that the Executed Majority Refunding was not complete so as to Accomplish a Changed Debt Status to that Extent, Conflicts with Decisions of the Florida Supreme Court.

The cited opinions of the Supreme Court of the State of Florida,—State ex rel Garland v. City of Palm Beach, 193 So. 297, State v. West Palm Beach, 193 So. 839, cannot be considered as a rule and guide to the Bankruptcy Court in construing either the Act or an amendment to the Municipal Bankruptcy Act. (See also Block v. City of West Palm Beach, 112 F. (2d) 949).

The Garland case was one where the non-assenting bondholders sought to secure payment of their bonds

at one hundred cents on the dollar from levies that had been made by the City under the provisions of the State Refunding Act of 1931 (Chapter 15772, Oct., 1931, Sec. 2383 (1 to 34), C. G. L. Florida, 1927, Permanent Supp.) The language of the court in the West Palm Beach case is merely argumentative and used for the purpose of supporting the erroneous contention of the Petitioners for Writ of Certiorari in this case.

The Court in the latter case had nothing before it but the question of the validation of bonds proposed to be issued by the City of West Palm Beach under the Refunding Act of 1931.

In seeking to support their theory that the bondholders who have accepted refunding bonds should be considered as one class and bondholders who have not refunded should be considered as another class, the Petitioners for the writ have overlooked the decision of the Circuit Court as well as the definitions in the statute itself as to what creditors constitute a **class or classes under the law.**

In Vallette et al. v. Vero Beach, supra, the Court said:

> "The Act, Sec. 83(b), declares that at the hearing or a continuance thereof, if the allegations of the petition are sustained, 'the judge shall classify the creditors according to the nature of their respective claims and interests; provided, however, that the holders of all claims, regardless of the manner in which they are evidenced, which are payable without preference out of funds derived from the same source or sources

> shall be of one class. The holders of claims for the payment of which specific property or revenues are pledged, or which are otherwise given preference as provided by law, shall accordingly constitute a separate class or classes of creditors'."

The court in this case had before them the question of whether there is any lien or preference because of the grant of a mandamus, either before or after judgment. Should the law permit a preference, it seems to us that this (Vallette case) is a much stronger case in favor of a preference or separate classification. Here the bondholder has sought court action and merged his obligations into an enforcible judgment and seemingly would be entitled to a separate classification over those non-assenting bondholders who have taken no action.

But in reference to the claim of the judgment holders the court said in the Vallette case:

> "No law gives them any preference. They fix no vested right in any existing thing which the bankruptcy power could not touch or which could not be arrested by injunction under Sec. 83 (c). The judge rightly held that all bonds and coupons were payable from the same source, to-wit, general property taxation, whether evidenced by judgment or otherwise, and were to be classed together under the Act."

No one contends that the Homestead bonds are to be paid in any manner except by ad valorem taxation, and, therefore, under the law are classed together under the Act.

POINT III

The Circuit Court of Appeals Construed the Bankruptcy Act to be Applicable to a Proceeding which is beyond the Scope of Bankruptcy Compositions.

Reliance is placed in the language used by the court in In re City of West Palm Beach, Fla., Fifth Circuit, 96 F. (2d) 85, and other cases, to support the contention that the amendment, subsection (j) should not be controlling in this case in spite of the fact that the amendment was passed by the Congress to provide a remedy for the precise situation in which the City of Homestead finds itself. The report of the Committee of the Judiciary accompanying H. R. 10753 (Report No. 2693, 75th Congress, 3rd Sess.), clearly shows the intent of the Congress.

The court in American National Bank v. Sanford, 112 F. (2d) 435, likewise thought the same when they said:

> "That the amendment was intended to reach and provide a remedy for the precise situation in which the City of Sanford finds itself, we think there can be no doubt. From the report of the Committee of the Judiciary accompanying H. R. 10753, it plainly appears that it was passed to meet the situation dealt with in our opinion in Re City of West Palm Beach, Florida, 5 Cir., 96 F. 2d 85. We think it equally clear that the amendment, if valid, is effective to meet and provide a remedy for that situation. It declares that the fact that the 'partial completion or exe-

> cution of any plan of composition occurred before the filing of the petition, shall not be construed as limiting or prohibiting the effect of this act' and it specifically provides 'the written consents of the holders of any securities outstanding as the result of any such partial completion or execution of any plan of composition shall be included * * * in determining the percentage of securities affected by such plan.' It would be difficult to employ plainer language. We therefore reject as wholly without merit appellant's first and second contentions that the amendment was not intended to, and does not in terms, authorize the filing and, if the conditions of the act are met, the approval of the voluntary plan, as a plan of composition in bankruptcy."

The confusion of Counsel for Petitioners over the terms "refunding agreements and contracts," "arrangements for unsecured debts," "reorganizations," "compositions," "municipal debt adjustments" is largely responsible for the untenable position in which they find themselves at this time.

> "The intent of the parties to a contract is not to be determined by the 'label' of the agreement, but rather it is to be gathered by considering all of the acts, statements and writings which go to make up the contract (Ketchum v. Duncan, 96 U. S. 659; 24 L. Ed. 868)." In re Lindsay-Strathmore Irr. Dist., 25 F. Supp. 988.

Generally, "A composition with creditors is an agreement made by an insolvent or embarrassed

debtor with two or more of his creditors by which such creditors agree to receive a certain portion in full satisfaction of their claims." 15 C. J. S. 671.

As an agreement and method of adjustment, " 'Composition,' as concerns debtor, is an agreement with creditors in lieu of distribution of debtor's property in bankruptcy, and, as concerns dissenting creditors, composition is method of adjustment among creditors of rights of property in which all are interested." Louisville Joint Stock Land Bank v. Radford, supra.

As great progress was made in the ordinary bankruptcy proceedings over a long number of years, there has likewise been a belief that the bankruptcy power under the Constitution is ever expanding to meet the needs of not only railroads, farmers, wage earners and corporations, but now public debtors. This may be noted from the recent Acts of the Congress touching these various spheres in our financial structure.

In the field of public debtors we have found situations where proceedings were begun without a plan, as is evidenced by the proceedings in the Continental Ill, N. B. & T. Co. vs. C. R. I. & P. R. Co., 294 U. S. 648, 79 L. Ed. 1110, 55 S. Ct. 595.

With a re-adjustment plan submitted by a bondholders protective committee long before the passage of the Municipal Bankruptcy Act, as was done in the Luehrmann v. Drainage Dist. No. 7 case, supra, where practically all bonds were in the hands of the Recon-

struction Finance Corporation not as owner, but as pledgee with a plan of refunding. See also In re Lindsay-Strathmore Irr. Dist. 25 F. Supp. 988.

Without the bonds having been validated, such as has occurred in the Ft. Lauderdale case supra.

With a refunding plan and with all bonds validated ready for delivery, but not exchanged, as occurred in the Vallette v. City of Vero Beach case supra.

Now the case has progressed one step further where, with a refunding or adjustment plan, there has been a partial completion of the plan through exchange of bonds, and under the provisions of subsection (j), such plan may be considered as a plan of composition upon its being presented to the Court. See In re City of West Palm Beach, 96 F. (2d) 85; In re Corcoran Irr. Dist., 27 F. Supp. 322. (D. C. Cal.)

POINT IV

In Upholding an Application of the Act Beyond its Composition Scope, the Decision of the Circuit Court of Appeals Ignores Constitutional Barriers.

The substance of this contention is that Section 83 (j) is not an appropriate exercise of the bankruptcy power by the Congress. The recent decisions of this Court have shown a liberal attitude in their consideration of bankruptcy legislation as is evidenced by the language of Mr. Justice Sutherland in the case

of Continental Ill. N. B. & T. Co. v. C. R. I. & P. R. Co., supra, when he said:

> "The fundamental and radically progressive nature of these extensions becomes apparent upon their mere statement; but all have been judicially approved or accepted as falling within the power conferred by the bankruptcy clause of the Constitution. Taken altogether, they demonstate in a very striking way the capacity of the bankruptcy clause to meet new conditions as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to the present day. And these acts, far-reaching though they be, have not gone beyond the limit of congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed."

At the time of the passage of subsection (j), this Court had sustained the constitutionality of the Municipal Bankruptcy Act. U. S. v. Bekins, 304 U. S. 27, 58 Sup. Ct. 811. The necessity requiring the passage of section 83 (j) was occasioned by the holding of the Circuit Court of Appeals for the Fifth Circuit, In re City of West Palm Beach case, supra. It may be judged from the report of the Committee of the Judiciary that the Municipal Bankruptcy Act should be amended in order that the purpose of the Act be not defeated by non-assenting creditors of municipalities which had partially completed refunding operations by the exchange of bonds prior to the passage of the Act. There can be no doubt that subsec-

tion (j) is appropriately related to the subject of bankruptcy and that its passage is within the constitutional power of the Congress.

Continental Bank v. Rock Island Ry.,
294 U. S. 648.

United States v. Bekins,
304 U. S. 27.

Wright v. Union Central Ins. Co.,
304 U. S. 502.

Louisville Bank v. Radford,
295 U. S. 555.

Local Loan Co. v. Hunt,
292 U. S. 234.

Hanover National Bank v. Moyses,
186 U. S. 181.

In re Reiman, Fed. Cas. No. 11,673.

We again find Petitioners here confused in their understanding of the "basic principles of composition." The language of the amendment is specific, is clear and certainly relates to the Act that it seeks to amend. The section is not in violation of either the Fifth or the Tenth Amendment to the Constitution of the United States.

> "(10-13). The constitutionality of the Act being beyond question (United States v. Bekins, 1938, 304 U. S. 27, 58 S. Ct. 811, 82 L. Ed. 1137; In re Drainage District No. 7, D. C. Ark. 1938, 21 F.

Supp. 798; In re City of Fort Lauderdale, D. C. Fla. 1938, 23 F. Supp. 229) and the reduction of debts being of the essence of the exercise of the power of bankruptcy, there is no violation of due process. U. S. C. A. Const. Amend. 14. Hanover National Bank v. Moyses, 1902, 186 U. S. 181, 22 S. Ct. 857, 46 L. Ed. 1113. We cannot, as urged by counsel for the objectors, consider the reduction in the face value of their security as a deprivation of property affecting the fairness of the plan. If that were true, no plan of composition or reorganization could ever be approved, because all of them deprive, indirectly, some creditor of some property right, either by reducing the principal or interest due him, or by extending the time of maturity of his debt. See Kuehner v. Irving Trust Co., 1936, 299 U. S. 445, 452, 57 S. Ct. 298, 81 L. Ed. 340." In re Corcoran Irr. Dist., 27 F. Supp. 328.

CONCLUSION

The Respondent, The City of Homestead, Florida, respectfully submits that from the Petition and Brief filed in this cause by the Petitioners for a Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit, there appear to be no special or important reasons for the granting of the writ.

It clearly appears that there is no conflict in the decision of the Circuit Court of Appeals with any other decision rendered by another Circuit Court of Appeals and neither is there any conflict with any decision of the Supreme Court of the United States; that no important question of local law has been decided in conflict with applicable local decisions; that there is no emergency or necessity for the settlement by this Court of any question of Federal law.

WHEREFORE, Respondent, City of Homestead, Florida, prays that the Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit, be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 324

HARRY C. DAVIS, C. J. ROOT, AND ROY HOLLIS,
PETITIONERS

v.

CITY OF HOMESTEAD, FLORIDA, AND THE UNITED STATES OF AMERICA (INTERVENOR)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the District Judge was entered without opinion (R. 117–118). The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 130–132) is reported in 112 F. (2d) 438.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 5, 1940 (R. 132). A petition for rehearing (R. 133–151) was denied July 8, 1940 (R. 152). The petition for a writ of cer-

tiorari was filed August 12, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, 28 U. S. C. Sec. 347.

QUESTIONS PRESENTED

Over two-thirds of the creditors of a city, subsequent to the passage of the present Municipal Bankruptcy Act but prior to the decision of this Court sustaining its validity, voluntarily accepted refunding bonds in exchange for old bonds, pursuant to a plan submitted by the city. After the decision sustaining the Act, the plan was submitted by the city for confirmation in composition proceedings under Section 83 (j).

The questions are:

1. Whether, for the purpose of determining whether sufficient creditors had consented to the filing of the petition and to the confirmation of the plan, holders of the refunding bonds may be included among the consenting creditors.

2. Whether Section 83 (j), if construed so as to authorize their inclusion, is violative of the Fifth or Tenth Amendments.

STATUTE INVOLVED

Section 83 (j) of the Bankruptcy Act as amended, June 22, 1938, c. 575, Sec. 3 (b), 52 Stat. 940 (11 U. S. C., Supp V, Sec. 403 (j)), provides:

> The partial completion or execution of any plan of composition as outlined in any petition filed under the terms of this Act by the exchange of new evidences of indebtedness

under the plan for evidences of indebtedness covered by the plan, whether such partial completion or execution of such plan of composition occurred before or after the filing of said petition, shall not be construed as limiting or prohibiting the effect of this Act, and the written consent of the holders of any securities outstanding as the result of any such partial completion or execution of any plan of composition shall be included as consenting creditors to such plan of composition in determining the percentage of securities affected by such plan of composition.

INTEREST OF THE UNITED STATES

The United States was granted leave to intervene, pursuant to the Act of August 24, 1937, c. 754, 50 Stat. 751 (28 U. S. C. Sec. 401), to uphold the constitutionality of the Act of June 22, 1938, c. 575, Sec. 3 (b), 52 Stat. 940, Section 83 (j) of the Bankruptcy Act (11 U. S. C., Supp. V, Sec. 403 (j)). This brief is accordingly limited to a discussion of the constitutional questions involved.

STATEMENT

On May 3, 1939, the City of Homestead, Florida, filed a petition for composition of its debts (R. 1–19) pursuant to Sections 81–84 of the Bankruptcy Act, 11 U. S. C., Supp. V, Secs. 401–401. The petition alleged that the city was then insolvent (R. 16); that on or about October 18, 1937, the city proposed to its creditors a plan of composition under which refunding bonds and coupon certificates would be ex-

changed for the then-outstanding bonds, conditioned on acceptance by holders of 75% of the outstanding bonds (R. 2–3); that the required number of consents had been obtained; and that the refunding bonds and coupon certificates had been exchanged for more than 75% of the old bonds of the consenting creditors (R. 2–4). The petition alleged further that the holders of more than 51% of the securities affected by the plan had consented (R. 13, 16, 18) to the filing of the petition and prayed the confirmation and completion of the plan (R. 18–19). The district court approved the filing of the petition on May 3, 1939 (R. 74) and ordered a hearing to be had on July 25, 1939 (R. 74–79). Petitioners filed answers and objections to the plan (R. 80–85, 89–101, 105–115), and two of the petitioners moved to dismiss the petition (R. 86–89, 102–105).

The answers and motions to dismiss alleged, *inter alia,* that Section 83 (j) of the Bankruptcy Act, if construed to authorize the inclusion of the consents of holders of the new refunding bonds and certificates in the 51% of the consenting creditors required by the Municipal Bankruptcy Act for the filing of the petition, and in the 66⅔% required for confirmation of the plan, violated the Fifth and Tenth Amendments of the Constitution of the United States (R. 87, 96, 103–104, 111–112).

The United States was permitted to intervene (R. 115–116) pursuant to the Act of August 24,

1937, Public, No. 352, 75th Congress, and immediately filed a petition praying that the objections to the constitutionality of the statute be overruled (R. 115–116). On October 21, 1939, the district court denied the motions to dismiss, overruled "certain matters of law" in the answers (R. 117–118), and referred the case to a Special Master for the taking of testimony (R. 118). From the order denying the motion to dismiss and overruling the matters of law in the answers, the petitioners appealed (R. 119).

On appeal the court below, following its decision in *American National Bank* v. *City of Sanford,* 112 F. (2d) 435 (No. 323, present Term, on petition for writ of certiorari), affirmed the order (R. 130–132).

ARGUMENT

1. The petitioners' contention that Section 83 (j), if construed to apply to this case, violates the Tenth Amendment is without substance. The "subject of bankruptcies" is nothing less than "the subject of the relations between an insolvent or non-paying or fraudulent debtor, and his creditors, extending to his and their relief." *In re Reiman,* Fed. Cas. No. 11,673, at 496–497, quoted with express approval in *Continental Bank* v. *Rock Island Ry.,* 294 U. S. 648, 672–673; *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, 588; *Hanover National Bank* v. *Moyses,* 186 U. S. 181, 187; *United States* v. *Bekins,* 304 U. S. 27, 47; and *Wright* v. *Union Central Ins. Co.,* 304 U. S.

502, 513–514. The innovation, if any, involved in the extension of the composition provisions of the municipal bankruptcy legislation to cases in which refunding operations have been partially executed by voluntary exchange is slight indeed when compared to those which have been uniformly sustained by this Court. See *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, 671.

2. The question whether Section 83 (j), as applied to this composition proceeding, violates the Fifth Amendment is substantially the same as that presented in No. 323; the Court is therefore respectfuly referred to the discussion of this point in the Government's brief in opposition in that case.

The facts of this case differ from those in No. 323 in only one respect. Here the city's offer to refund outstanding bonds was made shortly after the passage of the present Municipal Bankruptcy Act, although prior to this Court's decision in *United States* v. *Bekins,* 304 U. S. 27, sustaining its constitutional validity. The dissenting creditors were thus put on notice, by a statute then in effect, that by following the statutory procedure the city and the consenting creditors could bind the small minority of dissenters. This has now been accomplished. Petitioner can obtain no advantage from the fact that the city first chose to seek a voluntary settlement rather than a com-

position under a statute which could then be viewed only as of dubious validity; here, as in No. 323, Congress could make the consents valid retroactively. Compare *Welch* v. *Henry,* 305 U. S. 134, 147–148.

3. The decision of the Circuit Court of Appeals for the Eighth Circuit in *Luehrmann* v. *Drainage Dist. No. 7,* 104 F. (2d) 696, is not in conflict with the decision below. In that case the Reconstruction Finance Corporation made a refunding loan to the drainage district; more than 98% of the bonds were deposited with a trustee. The bonds were not cancelled but were held as security for the payment of the debt. After the passage of the Municipal Bankruptcy Act of 1934, disbursements to the depositing bondholders were made on the basis of approximately 25% of the face value of the securities. The 1934 act was subsequently invalidated, but, following the passage of the present statute, composition proceedings were instituted. The court held that the bondholders who deposited their securities and settled on the basis of 25% of the par value were entitled to be included among the consenting creditors. It is true that the court mentioned the fact that the bonds were not cancelled and were retained as security for the payment of the debt. But it nowhere suggested, and certainly did not hold, that a different result would have been reached if the bonds had been cancelled. Section 83 (j) was nowhere adverted to in the opinion.

CONCLUSION

The decision of the court below was correct. There is no conflict. The petition for certiorari should, therefore, be denied.

Respectfully submitted.

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